UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JTH TAX, INC. d/b/a LIBERTY TAX SERVICE, **Plaintiff,** **v.** **JEROME REED,** **Defendant.**	}	**Civil No. 2:07cv169**

Memorandum in Opposition to Defendant's Motion to Enlarge Time and Reply Memorandum in Support of Liberty's Motion for Default Judgment

NOW COMES the Plaintiff, JTH Tax, Inc. d/b/a Liberty Tax Service ["Liberty"], by counsel, and for its Memorandum in Opposition to Defendant's Motion to Enlarge Time and Reply Memorandum in Support of Liberty's Motion for Default Judgment, states as follows:

I. Argument

Federal Rule of Civil Procedure 55(a) provides for the entry of a default judgment when a party has "failed to plead or otherwise defend" their case. "Entry of default judgment is committed to the sound discretion of the Court and shall be reviewed only for abuse of discretion. The Court may also set aside entry of default for good cause shown pursuant to either Rule 55(c) or 60(b). *JTH Tax, Inc. v. Annie Smith*, 2006 U.S. Dist. LEXIS 42584 (E.D. Va. 2006). The Federal Rules of Civil Procedure require that a defendant serve an answer within 20 days of being served with the summons and complaint. *Id.* Reed has not complied with this rule and has not stated any such good cause which would warrant the denial of

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Liberty's Motion for Default Judgment or the granting of Reed's Motion for Enlargement of Time.

In *JTH Tax, Inc. v. Smith*, for example, this Court granted Liberty's Motion for Default Judgment against Smith, a former franchisee despite the defendant's plea that default be set aside. 2006 U.S. Dist LEXIS 42584. The Court explained, "Generally a default judgment is warranted where a defendant has failed to plead or otherwise defend the action." *Id.* at 5. "A court may, however, consider other factors such as the prejudice to the plaintiff and the merits and sufficiency of the complaint." *Id.* The Court further explained that the "Defendant does not provide any evidence that contradicts Plaintiff's complaint…." *Id.* at 5.

Similarly, Reed does not provide any credible evidence contradicting Liberty's Complaint or supporting a good cause argument that default be set aside. In fact, Reed's argument in its entirety is based upon assertions made by counsel in pleadings about Reed's alleged confusions and assumptions. Not one of these allegations is supported by any Affidavit or Declaration by Reed or any other person. Hence, Reed's assertions that good cause to set aside default should be accorded no weight.

Moreover, when a court decides whether to set aside an entry of default, it has the discretion to determine whether a proffered defense or counterclaim is meritorious. *Bank of Southside Virginia v. Host & Cook, LLC*, 239 F.R.D. 441, 445 (E.D. Va. 2007). "[O]nce a party is in default, it has the burden to show, by some amount of evidence, not by mere assertion, that it has a viable defense or counterclaim. If the party cannot make such a showing, it fails the meritorious defense requirement." *Id.* Reed has failed to make this showing.

Reed also attempts to blame his New Jersey counsel for his failure to timely respond to Liberty's Complaint. Yet, Reed, a businessman sophisticated enough to enter into five voluminous franchise contracts with Liberty, simply chose not to respond to Liberty's Complaint. A party bears responsibility for its failure to retain counsel and to apprise itself of the date of service of process. *Bank of Southside Virginia v. Host & Cook, LLC*, 239 F.R.D. 441, 449 (E.D. Va. 2007). Reed should not be able to attribute his failure to respond to his former counsel when he was personally served with a Summons and Complaint and the Summons plainly stated on its cover page, "**YOU ARE HEREBY SUMMONED** and required to serve upon PLAINTIFF'S ATTORNEY … an answer to the complaint which is herewith served upon you, within twenty (20) days after service of the this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint." (emphasis in original).

II. CONCLUSION

The Court should grant Liberty's Motion for Default Judgment and deny Reed's Motion for Enlargement of Time.

JTH Tax, Inc. d/b/a Liberty Tax Service

By: ________________/s/______________________

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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